

Attachment H

Draft Amended Programmatic Agreement and NAGPRA Plan

Attachment H to the ALP Project Draft Supplemental Environmental Impact Statement (DSEIS) includes an amended draft of the Programmatic Agreement which sets forth the procedures to be adhered to in order to ensure compliance with historic preservation laws. A plan which addresses the treatment of all human remains, sacred objects, and objects of cultural patrimony discovered as a result of the ALP Project is also included, in compliance with the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA).

Reclamation will ensure that the terms of this Agreement are followed during the development and construction of the Non-Structural/Non-Binding components of this Project. The costs associated with Section 106 compliance, as outlined under the terms of this Agreement, and the Cost Sharing Agreements entered into by the respective non-Federal agencies, will be born by the respective non-Federal agencies.

D. Post - Construction Management of Historic Properties

Within two years of completion of construction activities on Project lands which remain under Reclamation authority (e.g., Ridges Basin), Reclamation will develop and implement a Cultural Resources Management Plan (CRMP). The CRMP will be developed in consultation with SHPOs and the Advisory Council, and traditional communities whose TCPs may be affected. The CRMP will provide for the long-term management of historic properties within Reclamation jurisdiction. The CRMP shall specify at a minimum:

1. provisions for in-place preservation (including monitoring and remedial measures).
2. means to manage for future recreational development (campgrounds, trails, etc.).
3. means to manage for Operation and Maintenance of Reclamation facilities.
4. proposed methods for public interpretation and public involvement.

IV. Discovery

In accordance with 36 CFR 800.11(a), Reclamation, through consultation with the SHPOs, has developed the following general plan, prior to developing the more detailed MOU referred to in Stipulation V below, for dealing with historic properties likely to be discovered during construction of the Project. Upon discovery of buried cultural materials during construction activities, the following steps shall be followed:

- A. Work shall cease in the immediate area of discovery;
- B. The cultural materials shall be protected from further disturbance;
- C. Within twenty-four (24) hours, the contractor making the discovery shall immediately notify Reclamation; in the event of human burial discoveries, Reclamation, when on privately- or state-owned lands within Colorado or New Mexico will notify the local chief of police, county sheriff, coroner, or official acting in a similar capacity, and land managing agency official of the discovery; a determination of jurisdiction will be made in consultation with the coroner.
- D. Reclamation will evaluate the discovery for its eligibility to the National Register of Historic Places;
- E. Reclamation will notify the appropriate SHPO, UMU, SUIT, and the Council of the discovery and afford the SHPO an opportunity to assess the discovery in the field provided that the inspection can be made within forty-eight (48) hours; and
- F. Reclamation and the SHPOs, SUIT, and UMU will consult to determine the most appropriate course of action on a case-by-case basis.

- G. When agreement is reached, Reclamation shall notify the Council of the discovery and of the measures agreed for treating the discovery.
- H. If Reclamation determines that agreement cannot be reached for treatment measures, Reclamation shall consult with the Council pursuant to Stipulation VII.

V. Treatment of Human Remains

- A. Reclamation shall ensure that any and all human remains, sacred objects, and objects of cultural patrimony discovered as a result of the Project will be treated with dignity and respect. In order to ensure the proper treatment of Native American human remains and associated grave items, and to comply with NAGPRA and implementing regulations 43 CFR Part 10, Reclamation will implement a NAGPRA Plan of Action (POA) (Appendix D) in consultation with the Tribes and other interested Native American Groups. The POA, which will take effect upon the implementation of the ROD, will establish procedures for the discovery, scientific analysis and reburial (if desired by the affected tribes) of human remains in an appropriate manner and location.
- B. In the event human remains are encountered during construction activities, Stipulation IV of this Agreement will immediately take effect. In anticipation that human remains may be encountered during archaeological excavations, Reclamation, whenever operating on privately- or state-owned land within Colorado or New Mexico, in addition to notifying those parties as required in Stipulation V, will obtain an excavation permit from the office of the State Archaeologist (CO) or the Cultural Properties Review Committee (NM) prior to removal of any such remains. If the burial is determined to be pre-historic or historic in nature, Reclamation will accept responsibility for proper treatment of the burial, in accordance with the POA. If the burial is determined to be non-Native American and less than 100 years old, procedures will be in accordance with Stipulation IV.C.

VI. Amendments

Any party to this Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.13 to consider the amendment.

VII. Dispute Resolution

Should any of the signatories object within (30) days to any plans provided for review or actions proposed pursuant to this Agreement, Reclamation shall consult with the objecting party to resolve the objection. If Reclamation determines that the objection cannot be resolved, Reclamation shall forward all documentation relevant to the dispute to the Council. Within thirty (30) days after receipt of all pertinent documentation, the Council will either:

- 1) provide Reclamation with recommendations, which Reclamation will take into account in reaching a final decision regarding the dispute; or,
- 2) notify Reclamation that it will comment pursuant to 36 CFR 800.6(b) and proceed to comment. Any Council comment provided in such a request will be taken into account by Reclamation in accordance with 36 CFR

800.6(c)(2) with reference only to the subject of the dispute; Reclamation's responsibility to carry out all actions under this Agreement that are not the subjects of dispute will remain unchanged.

VIII. Public Objection

At any time during implementation of the measures stipulated in this Agreement, should an objection to any such measure or its manner of implementation be raised by a member of the public, Reclamation shall take the objection into account and consult as needed with the objecting party, the SHPO, or the Council, to resolve the objection.

IX. Failure to Carry Out the terms of this Agreement

In the event that Reclamation does not carry out the terms of this Agreement, Reclamation will comply with 36 CFR 800.4 through 800.6 with regard to individual activities covered by this Agreement.

X. Annual Review

Reclamation will consult with the signatories to the Agreement annually to review implementation of the terms of the Agreement and determine whether revisions are needed. If revisions are needed, the signatories to the Agreement shall consult in accordance with 36 CFR Part 800.13 to make such revisions. Annual reviews shall be initiated by Reclamation with the submittal of an annual report to the SHPOs and Council of the actions taken. The first annual report shall be due one year from the execution of this Agreement.

XI. Termination of this Agreement

Any party to this Agreement may terminate the Agreement by providing thirty (30) days written notice to the other consulting parties, provided that the parties shall consult prior to the period of termination to determine whether the issues can be resolved and the Agreement reimplemented in amended form. In the event of termination, Reclamation will comply with 36 CFR 800.4 through 800.6 with regard to this undertaking.

XII. Attachments

All attachments developed and implemented in accordance with this Agreement are incorporated by reference into the Agreement and their terms and conditions shall have the same force and effect as this Agreement.

XIII. Execution of Agreement

Execution of the Agreement and implementation of its terms evidences that Reclamation has afforded the Council an opportunity to comment on the Project and its effects on historic properties; taken into account the effects of the project on historic properties; and satisfied its Section 106 responsibilities for all individual aspects of the Project.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

BY:

DATE:

TITLE:

BUREAU OF RECLAMATION

BY:

DATE:

CHARLES CALHOUN
REGIONAL DIRECTOR, UPPER COLORADO REGION

COLORADO STATE HISTORIC PRESERVATION OFFICER

BY:

DATE:

STATE HISTORIC PRESERVATION OFFICER

NEW MEXICO STATE HISTORIC PRESERVATION OFFICER

BY:

DATE:

STATE HISTORIC PRESERVATION OFFICER

XIV. Concur

TITLE:

SOUTHERN UTE INDIAN TRIBE

BY:

DATE:

CHAIRMAN

UTE MOUNTAIN UTE TRIBE

BY:

DATE:

CHAIRMAN

--DRAFT--

APPENDIX

Native American Graves Protection and Repatriation Act (NAGPRA)
Plan of Action (POA)

**A WRITTEN PLAN OF ACTION FOR THE TREATMENT OF
INTENTIONALLY EXCAVATED OR INADVERTENTLY DISCOVERED
HUMAN REMAINS, FUNERARY OBJECTS, SACRED OBJECTS,
OR OBJECTS OF CULTURAL PATRIMONY
FOR THE PROPOSED ANIMAS-LA PLATA WATER PROJECT**

Pursuant to 43 CFR part 10, §10.5 (e), for the Native American Graves Protection and Repatriation Act (NAGPRA), the following written plan of action will be implemented for all discoveries made during data recovery of cultural resources properties or construction activities within the proposed Animas-La Plata (A-LP) project area.

I. Kinds of Objects to Be Considered as NAGPRA Items

For all discoveries, the kinds of objects to be considered and referred herein as *NAGPRA items* as defined in §10.2 (d) include:

A. *Human remains* means the physical remains of a human body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets or individual teeth. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.

B. *Funerary objects* means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or as being related to specific individuals or families or to known human remains. The term *burial site* means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of grave site. For purposes of completing the summary requirements in §10.8 and the inventory requirements of §10.9:

1. *Associated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.
2. *Unassociated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered Unassociated funerary objects.

C. *Sacred objects* means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. These NAGPRA items are rarely found within archaeological sites. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious

significance or function in the continued observance or renewal of such ceremony. The term *traditional religious leader* means a person who is recognized by members of an Indian tribe as:

1. Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe, or
2. Exercising a leadership role in an Indian tribe or based on the tribe's cultural, ceremonial, or religious practices.

D. *Objects of cultural patrimony* means items having ongoing historical, traditional, or cultural importance central to the Indian tribe itself, rather than property owned by an individual tribal or organization member. Similar to sacred objects, objects of cultural patrimony are rarely found within archaeological sites. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by an individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe as a whole.

II. Specific Information Used to Determine Custody

In the event of the removal of NAGPRA items during data recovery on federal lands within the proposed A-LP project area, the following specific information will be used to determine custody in the order listed below, pursuant to §10.6 (a).

A. A *lineal descendent of the deceased individual* is an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe.

B. Where a lineal descendent cannot be ascertained or no claim is made, custody will go to the *Indian tribe on whose tribal land* the NAGPRA items were discovered.

C. On federal non-tribal lands, *cultural affiliation* will be determined, pursuant to §10.14(c). Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe and the NAGPRA items of an earlier group:

1. Existence of an identifiable present-day Indian tribe with standing under these regulations and NAGPRA
2. Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:
 - a. establish the identity and cultural characteristics of the earlier group,
 - b. document distinct patterns of material culture manufacture and distribution methods for the earlier group, or
 - c. establish the existence of the earlier group as a biologically distinct population; and
3. Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe has been identified from prehistoric or historic times to the present as descending from the earlier group. This evidence may exist as geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. Claimants do not have to establish cultural affiliation with scientific certainty.

The following information was obtained through previous consultation with various Native American tribes and is based on what individual tribes said. It is not intended to narrow the focus of the Bureau of Reclamation (BOR) and/or other land-managing agency's responsibilities regarding consultation for NAGPRA issues. The Hopi Tribe,

Navajo Nation, the Uintah and Ouray Ute, Southern Ute and Ute Mountain Ute Tribes and the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santo Domingo, Zia, and Zuni, claim cultural affiliation to the prehistoric people who inhabited the Four Corners area, particularly southern Colorado and New Mexico. The Jicarilla Apache Tribe also wish to be consulted regarding cultural affiliation and custody if NAGPRA items are intentionally or inadvertently discovered during project.

III. Planned Treatment, Care, and Handling of NAGPRA Items

It is likely that NAGPRA items, particularly human remains and funerary objects, will be found during the course of any necessary data recovery project proposed for the A-LP Project or during construction activities associated with the proposed project. At the request of various tribes consulted for the project, the planned treatment, care, and handling of NAGPRA items recovered will be carried out in a respectful manner. For overall project consistency, and in as much as specific state laws of Colorado and New Mexico regarding the protection of human remains and funerary objects on private lands allows, this written plan will treat non-federal NAGPRA items in a similar manner. A brief summary of the state burial laws of Colorado and New Mexico may be found in Item X.

If human remains or other NAGPRA items, as described in Item I, are discovered intentionally or inadvertently during archaeological data recovery or construction in the proposed A-LP project area, all ground-disturbing activities shall cease within 50 feet (15.2 meters) of the burial. Archaeological work on that portion of the site containing the NAGPRA items will continue to the point that the nature and extent of the items can be determined. This may include full exposure of the burial feature. Non-destructive visual inspection of human remains shall be limited to determinations of age (of both the individual and the interment), sex, and cultural affiliation, while leaving any discovered NAGPRA items in place and protected. To the extent possible, such visual inspection shall be performed without handling, brushing off, or disarticulating human remains or other NAGPRA items.

Until disposition is determined, if possible, discovered NAGPRA items will be left in situ during the notification period described next. The appropriate land-managing agency will establish adequate measures to safeguard the site. This may include a 24-hour security guard posted at the site. If it is necessary to remove the NAGPRA items from the site, they will be held at a secure facility approved by the appropriate land-managing agency until a decision on final disposition is made.

The archaeological contractor or any inspector (construction and/or environmental) shall contact the BOR and/or appropriate land-management agency verbally within one (1) business day, followed by written notification within three (3) business days. This notification shall contain the following information:

- A. A verbal description of what has been found and the context in which NAGPRA items are located;
- B. The location of the NAGPRA items;
- C. A preliminary assessment of the type of NAGPRA items;
- D. An assessment of the complexity of the burial(s), human remains, and/or other NAGPRA items, and the likelihood of disturbance if left in place;
- E. A proposed location for reburial, if applicable; and
- F. Any other pertinent information.

The BOR and/or appropriate land-managing agency shall notify all interested Native American tribes verbally within one (1) business day, followed up with written notification within three (3) business days, as detailed in Item VI. The BOR and/or appropriate land-managing agency will also notify the appropriate State Historic Preservation Office verbally within one business (1) day, followed up with written notification within three (3) business days.

Upon certification of notification, the discovered NAGPRA items will be recorded archaeologically, as detailed in Item IV. Analysis of the NAGPRA items will be conducted as detailed in Item V.

If possible, NAGPRA items found through intentional or inadvertent discovery should be avoided and left in situ. All attempts will be made by the BOR and/or appropriate land-managing agency to leave and preserve these

discovered NAGPRA items in situ. If said NAGPRA items are in no danger of impact, the location shall be documented and the items protected, as necessary. If NAGPRA items are discovered within the construction zone and cannot be preserved in place, unless previous arrangements have been made with an interested tribe(s), those NAGPRA items encountered will be removed after certification of notification to the appropriate interested tribe(s).

Standard archaeological methods will be employed during removal. To the extent possible, removed NAGPRA items will be curated in the field until arrangements are made in consultation with the appropriate tribe(s) that desire to be part of the reburial action.

IV. Planned Archeological Recording of NAGPRA Items

Intentionally or inadvertently discovered NAGPRA items will be recorded at a descriptive non-invasive level including measurements, type, and morphology. The NAGPRA items should be both sketched and photographed in situ in the event that it becomes necessary to remove the items from the site. The location of the site containing the NAGPRA items shall be thoroughly described, and recorded on the appropriate 7.5-minute USGS topographic quadrangle map. Additionally, if NAGPRA items are left in the ground within a site, specific locations will be mapped and recorded using the most accurate standard available. This could include a tie-in to existing center-line drawings, corrected and calibrated GPS data, or an equivalent mapping technology. Locational information shall be provided to the BOR and/or the appropriate land-managing agency only.

V. Kinds of Analysis Planned for Each Kind of NAGPRA Item

During the discovery and notification period, analysis of discovered NAGPRA items will consist of non-destructive, in-field visual analysis to determine age and sex of individuals. Human remains shall not be brushed or otherwise handled unless absolutely necessary to make age and sex determinations. All analysis shall take place on site. If needed, security of the site will be accomplished as set forth in Item III.

As noted elsewhere in the plan, in limited circumstances it may be necessary to remove the human remains and other NAGPRA items for safekeeping. In addition, where reburial or leaving in situ is not possible, or where additional evaluation must take place in order to determine cultural affiliation, NAGPRA items may be removed using standard scientific methodology (which may include soil sampling), in a dignified manner.

If cultural affiliation cannot be determined for NAGPRA items, particularly human remains, that have been removed from the discovery location, it may be necessary to conduct more in-depth analysis to assist in determining cultural affiliation.

VI. Notification of Interested Indian Tribes

In the absence of any additional information for making a determination of cultural affiliation, the BOR and/or appropriate land-managing agency will contact all interested Native American tribes upon the discovery of Paleoindian, Archaic, Fremont, ancestral Puebloan, or unidentified human remains and funerary objects. The BOR and/or appropriate land-managing agency will contact the Uintah and Ouray Ute Reservation, Ute Mountain Ute Tribe, and Southern Ute Tribe upon discovery of Ute NAGPRA items. The BOR and/or appropriate land-managing agency will contact the Navajo Nation upon discovery of Navajo NAGPRA items. The BOR and/or appropriate land-managing agency will contact the Jicarilla Apache Tribe upon discovery of Apache NAGPRA items. If NAGPRA items are found on non-federal lands, the appropriate state officials will also be notified.

VII. Traditional Treatment of NAGPRA Items by Indian Tribes

The Hopi and Zuni Tribes, the Navajo Nation, and the Ute Tribes have indicated an interest in examining NAGPRA items prior to removal, and attend removal and reburial of these items. To the extent possible, these tribes' requests will be accommodated. Additionally, similar requests from other tribes will be accommodated to the extent possible.

VIII. Nature of Reports to Be Prepared

The results of investigations at a site containing discovered NAGPRA items shall be incorporated into the overall data recovery report as a detachable, confidential appendix. Site maps within the body of the overall data recovery report should identify all features, including those features containing discovered NAGPRA items. If permission is granted by the culturally-affiliated tribes, photographs, sketches, or detailed illustrations of the NAGPRA items may be included within the confidential appendix only.

IX. Disposition of NAGPRA Items

As stated previously in Item III, all attempts will be made by the BOR and/or appropriate land-managing agency to avoid discovered NAGPRA items and leave them in situ. NAGPRA items left or reburied in situ shall remain in the custody of the land-managing agency and will not be repatriated. In the event that discovered NAGPRA items must be removed, then the BOR and/or appropriate land-managing agency will determine, pursuant to §10.6, which Native American tribe will receive custody of the items. The BOR and/or appropriate land-managing shall provide notification of intent to repatriate and subsequently return the items to the appropriate tribe within the limitations of §10.15. Disposition of NAGPRA items discovered on non-federal lands will be determined in conformance with applicable state law and consultation with the appropriate Native American tribe(s).

X. State Burial Laws

With respect to human remains and associated funerary objects, and in some cases, other cultural items (such as sacred objects and objects of cultural patrimony), the following state laws for Colorado, New Mexico, and Utah will apply.

Colorado: (Colorado Rev. Stat. §24-80-401, et seq.): Upon discovery of human remains, the coroner and sheriff, police chief or land managing official will be notified and will have 48 hours to determine if forensic study is necessary. If not, the coroner will contact the State Archaeologist who will determine if the human remains are over 100 years old and if they are Native American. The Indian Commission will be notified if the human remains are Native American. Unless all parties agree unanimously to leave the human remains in situ, they will be removed from the discovery site. A permit obtained from the State Historic Society is required to excavate the human remains. The State Archaeologist will have 10 days to complete the excavation and assume custody of the human remains. The State Archaeologist will consult with the Indian Commission on reinternment and will pay for disinterment and analysis of any human remains from state lands and private lands, if no one else is willing. If human remains are discovered during an anthropological investigation, the archaeologist will determine the age and, if possible, cultural affiliation. If the human remains are less than 100 years old, the coroner will be notified; if the remains are over 100 years old, the State Archaeologist will be notified.

New Mexico: Upon discovery of human remains, all ground-disturbing activity will cease and the local law enforcement agency will be notified. The local law enforcement will then notify the Medical Examiner and State Historic Preservation Officer. The permits needed to excavate the unmarked human burial will be issued by the Cultural Properties Review Committee, in consultation with the State Archaeologist and SHPO, within 60 days of application. When the committee requires as a condition of the permit any object or artifact associated with a human burial be reinterred or disposed of, that burial will become the property of the person owning the land on which the artifacts or remains are discovered.